

Complaint

Mr and Mrs P have complained that after setting up their Family SunTrust, Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA) withdrew an important facility of the scheme - the non-proportionate allocation of investment growth facility.

They also complain that AXA has treated them unfairly by reneging on its July 2016 promise to carry out a discretionary 'ad hoc review'. Mr and Mrs P say they have lost out financially as a result. They're also unhappy with the way that AXA has handled their complaint.

Background

The Family SunTrust Scheme (FST) was a self-invested personal pension scheme (a "SIPP") which had been on the market since 2009. It allowed individual pensions to be grouped together and included a facility where investment growth could be re-allocated between members' pensions on a non-proportionate basis – (the "flexibility option").

The scheme was provided by a part of AXA which was subsequently bought by Phoenix

In late 2015, Mr and Mrs P completed paperwork to apply for the FST and to vary the terms of the FST to apply the flexibility option.

AXA sent Mr and Mrs P's adviser an email in November 2015, saying that discussions were ongoing with HMRC regarding the FST and some of the features couldn't be guaranteed going forward, in particular the flexibility option. It asked that the adviser contact AXA within three working days if Mr and Mrs P didn't want to proceed with their FST application.

By February 2016, Mr and Mrs P's FST had been set up and they had transferred funds into it. Their aim was to utilise the flexibility option and for any investment growth to be allocated into Mrs P's name.

In July 2016, AXA made the decision to remove the flexibility option attached to the FST. It wrote to Mr and Mrs P and their adviser (as well as other FST investors) on 2 August 2016 explaining that under the terms and conditions of the scheme it had decided to withdraw the flexibility option with effect from 2 September 2016.

On 28 July 2016, Mr and Mrs P, through their representative, asked for an '*ad hoc review*' to be completed. This was a *discretionary* feature of their contract. This review would allow any growth made within the FST from its start date to the review date to be transferred into Mrs P's name.

AXA confirmed to Mr and Mrs P's adviser via email on 10 August 2016 that this *would* be possible, and all requests received by 2 September 2016 would be honored. However, on 22 August 2016, AXA wrote again explaining that the ad hoc review couldn't be carried out.

Unhappy with this decision Mr and Mrs P's adviser complained to AXA on 31 August 2016 adamant that the review should go ahead.

On 16 September 2016, AXA responded by explaining that it had given the wrong information when it confirmed the review could still go ahead. It said this was due to a misunderstanding of the scheme's administrator's decision and that the scheme administrators had decided not to carry out any ad hoc discretionary reviews after the

decision was made on 27 July 2016 to remove the flexibility option.

On 30 September 2016, Mr and Mrs P's adviser queried the basis upon which AXA had dealt with Mr and Mrs P's complaint. AXA said it had treated this as a *non-material* complaint, but their adviser said this ought to have been treated as a *material* complaint as Mr and Mrs P had personally made the complaint, having lost out financially as a direct result of AXA's actions.

On 2 November 2016, AXA informed Mr and Mrs P's adviser that their complaint had previously been treated as a non-material one. On 7 November 2016, AXA issued its final response letter, again confirming that it would not be able to carry out the ad hoc review and explained its reasons why.

Unhappy with the response Mr and Mrs P brought their complaint to this Service. They questioned whether the flexibility option was removed "*illegally*" - due to another reason such as the sale to Phoenix. If so, they wanted it reinstated. They questioned whether AXA knew of the plan to withdraw the flexibility option at the point Mr and Mrs P had applied for it. They also wanted AXA to honour the ad hoc review of their FST.

The complaint was investigated by one of our adjudicators. He felt that AXA was entitled to withdraw the flexibility option. He said the product details allowed it to do so. He agreed, that having decided to withdraw the option, AXA hadn't acted unreasonably when it declined the ad hoc review requests it had already received.

However, he was of the view that while AXA's email of 10 August 2016 hadn't created an entitlement to an ad hoc review AXA had given wrong information to Mr and Mrs P and so therefore should pay them £200 for the trouble and upset this had caused them.

Mr and Mrs P didn't agree. They said, in summary:

- They hadn't seen the email from AXA to their adviser dated November 2015 where AXA had explained HMRC was conducting further enquires of the flexibility option.
- They were unaware that HMRC had stopped registering these schemes from July 2015.
- They say they are aware of two clients who have benefitted from the flexibility option being applied as late as November 2016 and the non-proportionate allocation of growth within their plans.
- They had met the deadline within which AXA told them to ask for an ad hoc review.
- £200 compensation does not adequately compensate them for their distress, inconvenience and financial loss.

AXA said in response that:

- The scheme administrators didn't agree to any ad hoc discretionary reviews after the decision to remove the flexibility option on 27 July 2016. Until 2 September 2016 (the 30 day notice period leading up to the removal of the flexibility option) reviews continued to take place where required by scheme rules, i.e. those reviews that were undertaken on a non-discretionary basis.
- The discretionary reviews were stopped because the scheme administrators made the decision to remove the flexibility option. Having done so, it was considered incompatible for it to continue to provide discretionary access to the flexibility option through an ad-hoc review.

- The decision to remove the flexibility option was in line with the terms and conditions and the schemes rules.
- It acknowledged that it gave Mr and Mrs P incorrect information about the ad hoc review being completed and so accepted to pay Mr and Mrs P £200 to recognise this.
- It dealt with this as a non-material complaint as the complaint was only about the refusal to undertake the ad-hoc review and there was no mention of any mis-selling or lack of information that Mr P now alleges.

I issued my provisional findings in August 2020 where I set out why I felt at that stage the complaint should be upheld in part. An extract of this is below and forms part of this final decision:

The terms and conditions of the Family SunTrust scheme state:

[AXA] has the right to decide that the provisions set out in the "Operative provisions" in part 3 of the document [i.e. the provision of the flexibility option] will cease to apply..... [AXA] can exercise this right only if there are changes in, or [our] interpretation changes of, applicable pensions, tax or other law, legislation, regulation or industry codes of practice. [AXA] can exercise this right upon giving....30 days written notice so far as practicable to do so.

So, I am satisfied that AXA had the ability to remove the flexibility option if it met the criteria in the terms and conditions. I have next considered whether AXA did indeed meet the criteria mentioned above. In particular, did it change its interpretation of the applicable pension laws and regulation. To do this I have looked at the history of AXA's involvement and dealings with the FST.

AXA has provided me with information concerning the development of the FST as well as the communications that took place between AXA and HMRC regarding the flexibility option. I have seen:

- *The template letters from the AXA FST manager to advisers where the scheme was applied for /or had been taken out. These are dated 2015 and 2016.*
- *The timeline of the development of the FST scheme, provided by AXA.*
- *Letters between HMRC and the FST team at AXA from May 2015 to July 2015 discussing the scheme and more specifically the flexibility option.*
- *The confidential reports to AXA from legal counsel regarding the flexibility option.*

From this information I can see that:

- AXA started to look into the feasibility of launching the product in late 2006. In light of HMRC legislation and after legal advice it launched the FST on a limited basis in March 2008 and launched it fully in February 2009.
- It's documented in the timeline provided by AXA that at this point in time HMRC's view was that the flexibility option was within the rules, but it was noted that HMRC provided no guarantees that position wouldn't change in the future.
- For the next few years, until 2015 the information indicates AXA kept reviewing the scheme and despite some changes to pension regulation over these years AXA remained satisfied that HMRC was content with the scheme and that its flexibility option was within the relevant rules. This included further legal opinion in 2013 indicating that the environmental risk in the area of pensions had increased but that the underlying legislation had not changed. In light of this AXA decided to continue operation of the FST unchanged.

- However, in May 2015 HMRC asked for further details from AXA about how the pooled growth in the scheme was allocated to its members. This appears to have been prompted by an increase in ‘pension liberation’ scams (a type of fraud). AXA’s response tried to reassure HMRC about the flexibility option, but HMRC advised that it had concerns over the model being used to allocate growth and it felt that this could be contrary to sections 172 (Assignment of benefits) and/or 172A (Surrender of benefits) of the Finance Act 2004.
- Because of these concerns, HMRC stopped registering new schemes.
- There was a further meeting between AXA and HMRC in September 2015.
- HMRC resumed registration of the FST in October 2015. In the same month AXA issued communications to advisers that registration of the FST had resumed but it’s discussions with HMRC were ongoing and all features of the product couldn’t be guaranteed to remain into the future. Advisers were invited to withdraw applications from new clients.
- Again in the same month AXA obtained further legal opinion in response to specific points HMRC raised at meetings between itself and AXA in September 2015.
- This led to AXA writing to HMRC in October 2015 asking it to withdraw their objections in light of its most recent legal opinion.
- There then followed much discussion between AXA and HMRC. And AXA again sought legal advice during this period.
- In January 2016 AXA issued second communications to advisers informing them that HMRC continued to investigate elements of the FST and that registration of the new schemes was at their own risk.
- However, because of the continued HMRC investigations AXA closed the FST to new business in May 2016.
- In June 2016 HMRC advised AXA its investigations were continuing.
- In July 2016 AXA obtained further legal opinion. The finding of this was that the risk environment within the area of pension had changed and more notably that HMRC continued to investigate the FST position even after submission in October 2015 of legal opinion and evidence that supported the flexibility option of the FST.
- Later that month the Board of AXA made the decision that it was no longer appropriate to continue with the interpretation that disproportionate allocation of growth was appropriate *within the pension framework as it was at that time*.

Taking account of this information, I’m satisfied AXA had been carefully considering the nature of the flexibility option for some time but that no decision was made to withdraw the flexibility option until legal advice was received in July 2016. AXA also appears to have engaged quite heavily with HMRC over the years to ensure it was being compliant with HMRC’s thinking and relevant regulation as well as seeking legal opinion when it felt prudent. Up to the point the decision was made to withdraw the option I think it was reasonable for AXA to provide the flexibility option to its clients as it hadn’t received any opposition from HMRC and all its legal advice was “positive”.

Given the information above I don’t think this decision was made quickly without careful consideration. I’m satisfied it followed a genuine change in AXA’s interpretation of applicable “pensions, tax or other law, legislation, regulation or industry codes of practice”. And while I appreciate this happened around the same time as the sale to Phoenix was progressing, I think this was mere coincidence rather than central to the decision to withdraw the feature.

I also note that AXA gave notice on 2 August 2016, which was just over 30 days before the option was officially withdrawn (on 2 September 2016), as required by the terms and conditions. I therefore don’t think AXA acted unfairly or unreasonably when it withdrew the

flexibility option and it acted in accordance with its terms and conditions when it did so.

Mr and Mrs P have said they didn't see the email AXA sent their adviser in November 2015. However, I have seen a copy of this email and am satisfied it was correctly addressed to the adviser. This email states:

Important Note: As you may be aware, Family SunTrust applications have been impacted by delays we [AXA] have experienced with the HM Revenue and Customs (HMRC) scheme registration process. We [AXA] have been working with HMRC on a resolution and they have agreed to register the schemes that were awaiting registration and also register further schemes that we [AXA] submit to them.

Although HMRC has agreed to register these schemes, our [AXA] discussions with them are still ongoing and until they have concluded we [AXA] cannot guarantee that all the current features of the product will remain in the future. In particular, the allocation of investment growth feature, which is just one of a number of features of Family SunTrust, is something we [AXA] continue to discuss with HMRC.

Therefore, if you don't wish us [AXA] to progress the application at this point in time please contact us [AXA] within three working days of the date of this email. If we [AXA] do not hear from you, we [AXA] will assume you are happy for us [AXA] to proceed.

I think this makes it clear that there were ongoing discussions between HMRC and that some features couldn't be guaranteed going forward, in particular the flexibility option. I can't know exactly what information Mr and Mrs P's adviser passed on. However, given that Mr and Mrs P were acting through their adviser I think AXA took active steps to make Mr and Mrs P aware that the flexibility option couldn't be guaranteed going forward. I think AXA fairly gave Mr and Mrs P the opportunity to withdraw their application for the FST if the flexibility option was of critical importance to them.

Having decided to remove the flexibility option I don't think AXA acted unfairly by not acceding to requests to carry out discretionary reviews to facilitate the non-proportionate allocation of growth, given HMRC's concerns about it. However, I do think that being given the wrong information about the ad hoc review wasn't ideal and caused frustration to Mr and Mrs P. I appreciate this was a mistake and it isn't unreasonable that AXA's misunderstanding was due to delays in communicating the scheme administrator's decision. But I do think this mistake should be recognised by AXA in the form of the £200 that it has already agreed to award. In my view this amount is fair and reasonable in the circumstances.

Finally, I agree that it ought to have been clear to AXA from the outset that Mr and Mrs P's complaint was about the removal of the flexibility option and the financial impact this would have on them. I think AXA took marginally longer to issue its final response than it should've. However, given that AXA was actively responding to the concerns raised by Mr and Mrs P during this period, I do not consider it appropriate to make any further award.

While both parties confirmed receiving the provisional decision neither party provided any further comments.

My findings

I've reconsidered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

As neither party provided further information or made any additional comments, I see no reason to depart from my provisional findings.

My final decision

My final decision is that I uphold this complaint in part.

Phoenix Wealth Services Limited (Phoenix), previously known as AXA Wealth Services Limited (AXA) should pay Mr and Mrs P £200 in recognition of the fact it gave them wrong information about their ad hoc review.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr and Mrs P to accept or reject my decision before 29 October 2020.

Ayshea Khan
Ombudsman